IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-697

ROMAN PINO,

Petitioner,

vs.

THE BANK OF NEW YORK, ETC, ET AL,

Respondents.

On Review From the District Court of Appeal for the Fourth District of Florida

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RESPONDENTS' ANSWER BRIEF

KATHERINE E. GIDDINGS
NANCY M. WALLACE
WILLIAM P. HELLER
AKERMAN SENTERFITT
106 E College Ave. 12th FL
Tallahassee, FL 32301

BRUCE S. ROGOW
TARA A. CAMPION
BRUCE S. ROGOW, P.A.
500 E Broward Blvd Ste. 1930
Ft. Lauderdale, FL 33394

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

Statutes

Other Authorities

STATEMENT OF THE CASE

A. The Certified Question

The Court accepted jurisdiction to review *Pino v. Bank of New York Mellon*, 57 So. 3d 950 (Fla. 4th DCA 2011) (Appendix A), an *en banc* decision of the Fourth District Court of Appeal. The decision certified the following question as a question of great public importance:

> DOES A TRIAL COURT HAVE JURISDICTION AND AUTHORITY UNDER RULE 1.540(b), Fla. R. Civ. P., OR UNDER ITS INHERENT AUTHORITY TO GRANT RELIEF FROM A VOLUNTARY DISMISSAL WHERE THE MOTION ALLEGES A FRAUD ON THE COURT IN THE PROCEEDINGS BUT NO AFFIRMATIVE RELIEF ON BEHALF OF THE PLAINTIFF HAS BEEN OBTAINED FROM THE COURT?

Appendix A at 5. The *en banc* court held the answer is "no" and affirmed the trial court's refusal to strike the notice of voluntary dismissal. The court below wrote: "Neither rule 1.540(b) nor the common law exceptions to that rule allow a defendant to set aside the plaintiffs [sic] notice of voluntary dismissal where the plaintiff has not obtained any affirmative relief before [voluntary] dismissal." *Id* at 3.

There was one dissent which adopted an opinion written by Judge Farmer before his retirement and before the release and publication of the *en banc* decision. *Id* at 5-6, n.3 (Polen, J., dissenting).

B. The Proceedings Lending to the Certified Question Opinion

Bank of New York Mellon brought a foreclosure action against Roman Pino in Palm Beach County, alleging it owned and held the note and mortgage by assignment. The court below set forth these facts which are undisputed:

> The complaint alleged that BNY Mellon owned and held the note and mortgage by assignment, but failed to attach a copy of any document of assignment. At the same time, it alleged the original promissory note itself had been "lost, destroyed or stolen."

Appendix A at 2. Pino moved to dismiss for failure to state a cause of action based on the lack of any assignment. BNY Mellon amended the Complaint by attaching "a new unrecorded assignment, which happened to be dated just before the original pleading was filed." *Id*.

Pino moved for sanctions, including the possibility of dismissal with prejudice, for fraud on the court, alleging "that the newly produced document of assignment was false and had been fraudulently made." *Id*. He contended "that the person executing the assignment was employed by the attorney representing the mortgagee, and the commission date on the notary stamp showed that the document could not have been notarized on the date in the document." *Id*. At the same time, Pino scheduled depositions of the notary and the witnesses to the assignment who were employees of BNY Mellon's Florida counsel. *Id.* Before the scheduled depositions, BNY Mellon filed a notice of voluntary dismissal pursuant

to Rule 1.420(a), Florida Rules of Civil Procedure. *Id*. at 3. The Court below stated the events that led to the issue now presented:

> Five months later, BNY Mellon refiled an identical action to foreclose the same mortgage. The new complaint no longer claimed the note was lost and attached a new assignment of mortgage dated after the voluntary dismissal. In the original, dismissed action, the defendant filed a motion under rule 1.540(b), seeking to strike the voluntary dismissal in the original action on the grounds of fraud on the court and for a dismissal of the newly filed action as a consequent sanction, requesting an evidentiary hearing. The trial court denied the motion without an evidentiary hearing, essentially holding that, because the previous action had been voluntarily dismissed under rule 1.420, the court lacked jurisdiction and had no authority to consider any relief under rule 1.540(b).

Id.

The *en banc* district court affirmed the trial court. It held it is not "an appropriate exercise of the inherent authority of the court to reopen a case voluntarily dismissed by the plaintiff simply to exercise that authority to dismiss it, albeit with prejudice." Appendix A at 4. The court concluded that "[o]nly in those circumstances where the defendant has been *seriously prejudiced* … should the court exercise its inherent authority to strike a notice of voluntary dismissal." *Id.* (emphasis in original; internal citations omitted).

The certified question was the product of the district court's comment that "many, many mortgage foreclosures appear tainted with suspect documents," which led to the question it posed to this Court, *i.e*., whether granting relief from a

voluntary dismissal and possibly barring the right to foreclose was a viable remedy as a sanction. *Id* at 4-5.

For the reasons that follow, the Respondent argues the *en banc* court's affirmance of the circuit court was correct; the answer to the certified question is "no"; and if there is authority to vacate a voluntary dismissal despite there being no affirmative relief secured by a plaintiff, then such a holding would be a new interpretation of the interplay between Rules 1.420 and 1.540 and courts' inherent authority, and should be prospective only.

SUMMARY OF ARGUMENT

Since *Randle-Eastern Ambulance Service, Inc. v. Vasta*, 360 So. 2d 68 (Fla. 1978), "[t]he right to dismiss one's own lawsuit … is guaranteed by Rule 1.420(a)" and "[t]he effect is … equivalent in all respects to a deprivation of 'jurisdiction.'" Subsequent decisions of district courts make it clear that the only "narrow exception" to the unfettered right to voluntary dismissal is where a plaintiff has engaged in fraud and obtained affirmative relief against a defendant before filing the notice of voluntary dismissal. In that circumstance—*i.e.*, "where the plaintiff engaged in fraud which resulted in affirmative relief from the court and, upon obtaining that relief, voluntary dismissed the case to prevent the court from taking away the ill-gotten relief"—striking a notice of voluntary dismissal has been endorsed. *See, inter alia*, *Service Experts, LLC v. Northside Air Conditioning & Electrical Serv., Inc.*, 56 So. 3d 26 (Fla. 2d DCA 2010).

That is not the case here. The bare allegation of "fraud" in the context of assignments of mortgage rights is not a basis for striking a voluntary dismissal notice, nor is it a basis for a proceeding under Rule 1.540(b) seeking to vacate the notice and voluntary dismissal. Because no affirmative relief had occurred *vis a vis* the defendant, and because there was no final judgment, decree, order, or proceeding which caused serious prejudice to the defendant, there was no basis under Rule 1.540(b) for vacating a notice of voluntary dismissal.

The certified question should be answered "no." A trial court *does not* have jurisdiction and authority under Rule 1.540(b) or under its inherent authority to grant relief from a voluntary dismissal where the motion alleges fraud on the court in the proceedings but no affirmative relief on behalf of the plaintiff has been obtained from the court.

If the answer to the certified question is, in any form, "yes," then the decision should be prospective only because such a new rule would be a sea-change in the established law relating to voluntary dismissals.

ARGUMENT

THE TRIAL COURT DOES NOT HAVE JURISDICTION AND AUTHORITY UNDER RULE 1.540(b), OR UNDER ITS INHERENT AUTHORITY, TO GRANT RELIEF FROM A RULE 1.420 VOLUNTARY DISMISSAL WHERE THE MOTION TO VACATE THE VOLUNTARY DISMISSAL ALLEGES A FRAUD ON THE COURT BUT NO AFFIRMATIVE RELIEF HAD BEEN OBTAINED AGAINST THE PARTY MAKING THE MOTION.

Standard of Review

The certified question presents a pure question of law. The standard of review is *de novo*. *See Johnson v. State*, --- So. 3d ---, 2012 WL 16692 at *5 (Fla. Jan. 5, 2012) ("pure questions of law subject to de novo review").

A. The Voluntary Dismissal Rule

The *en banc* decision extensively canvassed the relevant case law and concluded that, once the complaint was voluntarily dismissed, it was not subject to being vacated because no affirmative relief had been obtained. A current article in the Florida Bar Journal, *"It Ain't Over 'Til It's Over: The Common Law Exception to the Right of Voluntary Dismissal of Civil Actions,"* 86 Fla. B.J. No. 1, pp. 42-46 (2012), submitted "on behalf of the Trial Lawyers Section," assays many of the cases discussed in the *en banc* decision, and concludes that "the plain language of Rule 1.420(a)(1)" should be followed and "any common law exception to it rejected." *Id* at 44. Whichever approach is correct, there is no basis for vacating the voluntary dismissal in this case.

The starting point is the voluntary dismissal rule. Rule 1.420(a)(1) provides in relevant part that "any part of an action or claim may be dismissed by plaintiff without order of court (A) before trial by serving … a notice of dismissal at any time before a hearing on motion for summary judgment. . . . Unless otherwise stated in the notice . . . the dismissal is without prejudice. . . ."

The right to voluntary dismissal is "absolute." *Patterson v. Allstate Ins. Co*., 884 So. 2d 178, 180 (Fla. 2d DCA 2004) (quoting *Fears v. Lundsford*, 314 So. 2d 578, 579 (Fla. 1975)). A voluntary dismissal "divests the trial court of jurisdiction to relieve the plaintiff of the dismissal." *Randle-Eastern*, 360 So. 2d at 69. It is "immediate, final, and irreversible," and it "terminates the litigation and instantaneously divests the court of its jurisdiction to enter further orders." *Kelly v. Colston*, 977 So. 2d 692, 694 (Fla. 1st DCA 2008).

The analogous federal rule is Federal Rule of Civil Procedure 41(a)(1), which confirms the "unfettered right" to voluntarily dismiss. *Wolters Kluwer Fin. Serv's, Inc. v. Scivantage,* 564 F.3d 110,114 (2nd Cir. 2009). *In re Bath and Kitchen Fixtures Anti-Trust Litig.*, 535 F.3d 161 (3rd Cir. 2008), speaks to the consequences of a notice of voluntary dismissal:

> A timely notice of voluntary dismissal invites no response from the district court and permits no interference by it. . . *American Cyanamid Co. v. McGhee*, 317 F.2d 295 (5th Cir. 1963) ("[The notice] itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a

> matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court.").

Id at 165-66 (some internal citations omitted). Florida law is in accord. *Ambory v. Ambory*, 442 So. 2d 1087 (Fla. 2d DCA 1983) ("error for the trial court to take any further action after notice of voluntary dismissal was filed").

The absoluteness of the federal voluntary dismissal right may not protect a plaintiff from sanctions under Federal Rule of Civil Procedure 11 for filing a baseless complaint. *Cooter & Gell v. Hartmarx Corp*. 496 U.S. 384, 395 (1990). By analogy, section 57.105, Florida Statutes, might be an available remedy despite a voluntary dismissal. But the relief sought by Pino in this case was not that; it attacked the voluntary dismissal itself.

The Rule 1.540(b) motion filed by Pino (after BNY Mellon filed its new foreclosure case) was brought in the voluntarily dismissed case and was an effort to undo the voluntary dismissal. *See* Appendix B to this Brief: "Defendant, Roman Pino's Rule 1.540(b) Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court." Mr. Pino sought to wholly vitiate the voluntary dismissal. The 1.540(b) motion relied upon *Select Builders of Florida, Inc., v. Wong*, 367 So. 2d 1089 (Fla. 3d DCA 1979). *See* Appendix B at 2. *Select Builders* also is the centerpiece of the Petitioner's Brief in this case. *See* Initial Brief, citing *Select Builders passim*. Neither *Select Builders* nor the other cases offered by Pino support the relief he sought.

B. The Case Law

Ormond Beach Associates Ltd., v. Citation Mortgage, Ltd., 835 So. 2d 292, 295 (Fla. 5th DCA 2002), noted a very narrow exception to the unfettered right of voluntary dismissal:

> The only recognized common law exception to the broad scope of this rule is in circumstances where the defendant demonstrates serious prejudice, such as where he is entitled to receive affirmative relief or a hearing and disposition of the case on the merits, has acquired some substantial rights in the case, or where dismissal is inequitable. See *Romar Int'l, Inc. v. Jim Rathman Chevrolet/Cadillac, Inc*., 420 So. 2d 346 (Fla. 5th DCA 1982); *Visoly v. Bodek*, 602 So.2d 979 (Fla. 3d DCA 1992).

Id. at 385.

Select Builders approved "striking the voluntary dismissal and reinstating the matter to prevent a fraud on the court," but did so because "[t]he plaintiff *had obtained the affirmative relief it sought* [and] its actions in the cause in the trial court may have been fraudulent on the court. . . ." *Select Builders*, 367 So. 2d at 1091 (emphasis supplied). Pino argues that "[t]he circumstances here are remarkably similar to those of the *Select Builders* case." Petitioner's Initial Brief at 12. However, he completely fails to address the "affirmative relief" element that was central to *Select Builders*. The court below was correct in rejecting the *Select Builders* argument and distinguishing that case from this one, stating:

> BNY Mellon had not obtained any type of affirmative relief. Even if the assignment of mortgage was "fraudulent" in that it was not

> executed by the proper party, it did not result in any relief in favor of BNY Mellon.

Appendix A at 4. *See also Bevan v. D'Alessandro*, 395 So. 2d 1285, 1286 (Fla. 2d DCA 1981) (reversing an order dismissing with prejudice after plaintiff had entered a voluntary dismissal and emphasizing the "absolute right to take a voluntary dismissal"). The *Bevan* court stated the "right is so entrenched" that the trial court in *Randle-Eastern*, supra, "was not allowed to set aside a voluntary dismissal even when a plaintiff who had taken a voluntary dismissal quickly asked the court to set it aside after discovering that the statute of limitations had run on his wrongful death action." *Id*. *Bevan* also distinguished *Select Builders*: "There, however, the plaintiff had received affirmative relief to which he was not entitled and sought to avoid correction of the trial court's error by taking a voluntary dismissal." *Id*. More recently, the Second District reaffirmed that, absent affirmative relief being obtained against a defendant prior to the voluntary dismissal, the notice must be respected. *Service Experts, LLC v. Northside Air Conditioning & Electrical Serv., Inc.*, 56 So. 3d 26, 32 (Fla. 2d DCA 2010).

Thus the allegation of "fraud," without a showing of affirmative relief having been obtained, has uniformly been rejected as a basis to vacate a Rule 1.420(a)(1) voluntary dismissal. The cases and comments proffered by Pino do not carry the weight assigned to them and do not support a retreat from the rule in *Randle-Eastern* – a rule, which at that time, permitted dismissal during trial:

> The right to dismiss one's own lawsuit during the course of the trial is guaranteed by Rule 1.420(a), endowing a plaintiff with unilateral authority to block action favorable to a defendant which the trial judge might be disposed to approve. The effect is to remove completely from the court's consideration the power to enter an order, equivalent in all respects to a deprivation of jurisdiction.

Randle-Eastern, 360 So. 2d at 69.

Pino cites several cases relating to the inherent authority of courts when faced with "dishonesty" (Petitioner's Brief at 13-14), but none of those cases supports vacating a voluntary dismissal when a plaintiff has not secured any affirmative relief. *Tobkin v. State*, 777 So. 2d 1160, 1164 (Fla. 4th DCA 2001), reaffirms the absolute right to voluntary dismissal, and acknowledges a fraud on the court exception under *Select Builders.* *Fitzgerald v. Fitzgerald*, 790 So. 2d 1216 (Fla. 2d DCA 2001), echoes *Tobkin*, and therefore also must embrace the *Select Builders* formula of fraud *plus* the obtaining of affirmative relief. *Fitzgerald* notes a possibility "that the [voluntary dismissal] right may not exist in a dissolution proceeding if significant child custody issues are unresolved . . . ." *Id.* at 1217. If that gloss on the right to voluntary dismissal in child custody cases does exist, it would be consistent with the affirmative relief component of *Select Builders* because unresolved "significant child custody issues" involve ongoing domestic relations matters where affirmative relief is always available, not issues that are subject to the usual strictures of finality in general civil litigation.

U.S. Porcelain, Inc. v. Brenton, 502 So. 2d 1379, 1380 (Fla. 4th DCA 1987), which references *Select Builders* and "fraud, deception, irregularities," does not attempt to define the parameters of any common law exception to the right of voluntary dismissal. The case turns on when service of the notice is complete. *Durie v. Hanson*, 691 So. 2d 485 (Fla. 5th DCA 1997), provides an "unequivocal" yes to the question of the finality of a notice of voluntary dismissal, and its footnote to cases, including *Select Builders*, that "are not applicable to the instant case" *Id* at 486, n. 2, bolsters the inappositeness of the cases cited by Pino to support his effort to apply *Select Builders* to this case. Nor do the Florida Jurisprudence or Trawick cites (Petitioner's Brief at 14) affect the plain language of *Select Builders*. The dissent below used those sources too but made clear that the crux of its criticism of the majority was that "I disagree with *Select Builders*. . . ." Appendix A at 7 (Polen, J. dissenting).

Missing from the Petitioner's Brief is any reference to *Service Experts*. The plaintiffs in *Service Experts* sued some former employees for breach of fiduciary duty and tortious interference and

> after almost two years of litigation, after the Northside defendants served offers of judgment, after the close of discovery, and after the Northside defendants moved for summary judgment, Service Experts filed a one-sentence notice of voluntary dismissal of their complaint without prejudice. The Northside defendants responded by filing a motion to strike Service Experts' notice of dismissal or for entry of a dismissal with prejudice.

Service Experts, 56 So. 3d at 28. The Northside defendants argued that "Service Experts had perpetrated fraud on the court by filing two fraudulent affidavits in 2008." *Id*.

The Second District, citing *Select Builders*, held that "[o]nly under the right circumstances can fraud allegations support a trial court's decision to strike a plaintiffs [sic] notice of voluntary dismissal." *Id at 32*. The court distinguished *Service Experts* from *Select Builders*:

> [T]here is no record evidence that the trial court relied on the two affidavits *to confer upon Service Experts any affirmative relief or benefit*. . . . Thus, unlike *Select Builders*, this is not a case where the plaintiff engaged in fraud which resulted in affirmative relief from the court and, upon obtaining that relief, voluntary [sic] dismissed the case to prevent the court from taking away the ill-gotten relief. Without evidence of ill-gotten relief connected to the fraud allegations, the Northside defendant's allegations were insufficient to support striking the notice of voluntary dismissal on the basis of fraud.

Id. at 32 (emphasis in original).

The Florida *sine qua non* for possibly circumscribing the right to voluntary dismissal is affirmative relief obtained by fraud. Pino cannot meet that test. His concession to the *Select Builders* affirmative relief requirement, and his attempt to avoid it, is his argument that "BNY Mellon's procedural maneuver indefinitely blocked depositions that would have most likely exposed fraud—not only in this case, but in hundreds, if not thousands, of cases handled by its attorney, David J. Stern, P.A." Petitioner's Brief at 19. We address *infra* at pp. 17-18 the proper

remedies for alleged litigant or lawyer misconduct, but Pino's complaint misses the mark; his suggestion of investigative concerns is not a basis for undoing the law of voluntary dismissal.

Curtailing the absolute, unfettered right to voluntary dismissal based on the notion that the dismissed case might be a vehicle for discovering past or future patterns of misconduct has no support in established case law. Absent affirmative relief having been secured by the plaintiff, a defendant has no basis for invalidating a voluntary dismissal. *See, e.g., Service Experts,* 56 So. 3d at 33 (voicing sympathy for defendants deprived of a name clearing opportunity after lengthy litigation but concluding that voluntary dismissals are "virtually at will;" that the "line is very narrow and none of the exceptions preventing dismissal existed in this case").

C. Fla. Rule of Civil Procedure 1.540(b) Confirms That Affirmative Relief Is Required To Vacate A Notice Of Voluntary Dismissal

Mr. Pino's argument that "Rule 1.540(b) allows the striking of a voluntary dismissal when fraud is shown" (Petitioner's Brief at 1), is belied by the "relief/relieve" language of the rule. The Rule is entitled "Relief From Judgment, Decrees, or Orders." Subsection (b) states: "On motion and upon such terms as are just, the court may relieve a party. . . ." "Relief" and "relieve" presuppose that a party has been harmed or adversely affected. The *en banc* court captured the definition of those words and their relevance here:

> The rule, however, is limited to relieving a party of a judgment, order or proceeding. "Relieve" means "[t]o ease or alleviate (pain, distress, anxiety, need, etc.)… to ease (a person) of any burden, wrong, or oppression, as by legal means." *The Random House Dictionary of the English Language* 1212 (1967). A defendant may obtain such relief when a plaintiff has obtained a ruling that has adversely impacted the defendant. Here, the defendant has not been adversely impacted by a ruling of the court.

Appendix A at 4.

Nothing in Petitioner Pino's Brief, or in the record of the proceedings in circuit court, supports any finding that the BNY Mellon voluntary dismissal constituted affirmative relief against him or that he had suffered harm or injury beyond the "common consequences of litigation." *Service Experts*, 56 So. 3d at 33. Therefore Rule 1.540(b), while applicable to a voluntary dismissal notice, *Miller v. Fortune Ins. Co.*, 484 So. 2d 1221, 1224 (Fla. 1986), has no application where, as here, the plaintiff gained no advantage over the defendant.

D. <u>The Inherent Power Doctrine</u>

The thrust of Mr. Pino's Brief is that "[t]rial courts possess the inherent power to protect the function, dignity, and integrity of the judicial system." Petitioner's Brief at 13-20. The dissent from the *en banc* decision also is grounded on that concept: "All the texts base the court's authority to grant relief on the inherent power of the judges to protect the integrity of the court system in the litigation process." Appendix A at 7 (Polen, J., dissenting).

Those principles are unassailable; they go to the heart of the judicial system and form the foundation for insuring integrity in litigation. But they are not compromised by the conclusion reached by the *en banc court*, by the decision in *Service Experts*, by the decision in *Select Builders*, or by principled adherence to the plain language of Rules 1.420(a) and 1.540(b). Other remedies are available to ensure the integrity of the judicial system and to, if necessary, punish those who may have abused the system.

The decision below spoke of referral of the trial attorney to the Florida Bar "for a violation of the Code of Professional Responsibility for filing the complaint with the alleged false affidavit." Appendix A at 5. Rule 4-3.3 Candor Toward the Tribunal, subsection (a)(1), provides that "A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Subsection (4) provides that a lawyer shall not knowingly "offer evidence that the lawyer knows to be false." The Comment to 4-3.3 states: "This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process." Also, "[a]n advocate is responsible for pleadings and other documents prepared for litigation. . . ." The Rules Regulating the Florida Bar are a formidable check on litigation misconduct. *Randle-Eastern*, 360 So. 2d at 69 n.11, recognized that check and balance.

Criminal law is another bulwark against abuse of the judicial process. Notaries who provide false or fraudulent acknowledgments can be prosecuted for a third degree felony. § 117.105, Fla. Stat. A person who "agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy. . . ." § 777.04(3), Fla. Stat. That too would be a third degree felony, punishable "by a term of imprisonment not exceeding 5 years." § 775.082(4)(d), Fla. Stat.

Thus, it is not necessary to reject established law to protect the integrity of the judicial system; remedies exist other than vacating voluntary dismissals despite the absence of affirmative relief having occurred. The dissent below was candid: "I disagree with *Select Builders*, *Bevan* and *Service Experts* to the extent of any holding that affirmative relief or even some other benefit is necessary for relief from a voluntary dismissal filed after an attempted fraud on the court has been appropriately raised." Appendix A at 8 (Polen J., dissenting).

However, those three cases, and others which similarly recognize only a rare and narrow exception to respecting the right to voluntary dismissal—an exception that has no applicability here—are the decisions that should lead this Court to affirm the *en banc* decision below.

E. Prospectivity And Public Policy

On December 8, 2011, this Court, 4 to 3, maintained jurisdiction in this case despite the parties' stipulation and dismissal. The Court concluded the certified question "transcends the individual parties to this action because it has the potential to impact the mortgage foreclosure crisis throughout this state and is one on which Florida's trial courts and litigants need guidance. The legal issue also has implications beyond mortgage foreclosure actions." *Pino v. Bank of New York*, --- So. 3d ---, 2011 WL 6089978 at *1 (Fla. Dec. 8, 2011).

The certified question, and the Court's decision to address it, pose the possibility this Court may conclude a plaintiff's voluntary dismissal could be vacated under Rule 1.540(b) by an allegation of fraud, despite no affirmative relief having been obtained and no significant prejudice to the defendant having occurred. Finality to proceedings is imperative. For this reason, there must be materiality of any alleged fraud to obtain relief from a "judgment" under rule 1.540(b). *See, e.g., Flemenbaum v. Flemenbaum*, 636 So. 2d 579 (Fla. 4th DCA 1994) (alleged fraud merely raising *de minimis* matters that had no effect on the final judgment are insufficient to set aside judgment). Otherwise, all judgments would be subject to being vacated merely because some alleged fraud occurred. Likewise, there must have been some fraud relevant to affirmative relief obtained from the court before a voluntary dismissal is subject to being vacated based on

fraud. Otherwise, all voluntary dismissals would be subject to being vacated merely because of alleged fraud—even if that alleged fraud resulted in no benefit to the plaintiff and no harm to the defendant.

Nevertheless, should the court find merit in the Petitioner's argument and announce a rule that departs from the principles that animated *Randle-Eastern*, 360 So. 2d at 69 ("[t]he effect [of a voluntary dismissal] is to remove completely from the court's consideration the power to enter an order, equivalent in all respects to a deprivation of 'jurisdiction'"), and *Select Builders*, the pronouncement should be prospective only.

New rules, and decisions that change understood legal principles, are to be applied prospectively. *See Employers' Fire Ins. Co. v. Continental Ins. Co.*, 326 So. 2d 177, 181 (Fla. 1976); *Boyett v. State*, 688 So. 2d 308, 310 (Fla. 1996). Given the historical respect accorded to the Rule 1.420(a)(1) right to voluntary dismissal, an authorization for a trial court to investigate the bona fides of the notice or vacate it absent any affirmative relief (or actual prejudice) visited upon a defendant, fits the prospective only paradigm.

In addition, public policy favors prospective only relief. As the Court recognized in its December 8, 2011 Order, the issue "has implications beyond mortgage foreclosure actions." *Pino*, 2011 WL 6089978 at *1. The relief sought by Pino would open all voluntary dismissals to attack on bare allegations of fraud;

an outcome which could lead to collateral attacks on voluntary dismissal notices by defendants dissatisfied by being deprived of an opportunity to defend. This Court addressed, and rejected, that concern in *Randle-Eastern*: "There is no recompense, however, for a defendant's inconvenience, his attorney's fees, or the instability to his daily affairs which are caused by plaintiff's self-aborted lawsuit." 360 So. 2d at 69. *See also Service Experts*, 56 So. 3d at 33. If a sea-change is to be made, litigants and lawyers are entitled to knowledge of it going forward, not backward.[1]

As to mortgage foreclosures, if there have been in the past "many, many" foreclosures "tainted with suspect documents" (Appendix A at 5), opening the door to relitigating voluntary dismissals which may have occurred in those cases (assuming that there have been both numerous "suspect documents" and voluntary dismissals) would cause more harm than benefit to the efficient operation of the courts. The Court amended Florida Rule of Civil Procedure 1.110(b) to require verification of "ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate," and the Court provided "greater authority to sanction plaintiffs who make false allegations." *In Re Amendments to*

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[1] The scope of the sought-after change is apparent from the Amicus Curiae brief of Kaufman, Englett, & Lynd, PLLC, p. 10, in support of Respondent: "The Amici [sic] urges the Court to hold that in cases in which a fraud on the court as to a relevant issue is alleged, and the fraud is relevant to a central issue in the case, trial courts have jurisdiction and authority under Rule 1.540(b) to strike a voluntary dismissal when the dismissal is simply filed as a tactic to avoid sanctions." That construct opens a wide door.

the Fla. Rules of Civil Procedure, 44 So. 3d 555, 556 (Fla. 2010). Nothing in the rule suggested that voluntary dismissals were subject to sanctions. The Complaint in this case was filed before the rule amendment, in October 2008. The Notice of Voluntary Dismissal was filed in March 2009. There is no evidence in this record that subsequently filed foreclosures posed the issues which prompted Pino's Motion to Strike and for 1.540(b) relief.

The Rule Amendments were more than aspirational, they bolstered the standard for responsible lawyering in future foreclosures. If there were problems with cases filed and voluntarily dismissed before the rule amendment, reopening those cases would not serve the interests of a judicial system that has sought to manage foreclosure litigation efficiently and effectively. Creating a new wave of review of previously dismissed mortgage voluntary dismissal cases would promote unnecessary unsettled expectations and be counterproductive for litigants and trial courts.

F. <u>Jurisdiction Should Be Reconsidered.</u>

Despite certification of the question at issue, the law in this area is well-established. The *sua sponte en banc* opinion agreed with long-established law regarding vacating voluntary dismissals. Every other district court which addressed this issue has reached a similar conclusion. Given this uniform view of the law of voluntary dismissal, and because the parties stipulated to dismissal of this review

proceeding, the Court should consider again whether there is a need to address the question presented.

CONCLUSION

The certified question should be answered in the negative: trial courts cannot undo a notice of dismissal unless fraud has been the basis for obtaining affirmative relief against a defendant. Because that standard was not met in this case, the *en banc* decision should be affirmed. If not, the decision of this Court should be prospective only.

Finally, because the parties stipulated to dismissal of this review proceeding, the Court should consider again whether there remains a case and controversy that requires the Court to address the question presented. In light of the law that has been presented by the parties and their *amici*, perhaps the issue presented may no longer be viewed as so important that jurisdiction need be maintained.

Respectfully submitted,

KATHERINE E. GIDDINGS
FL Bar No. 949396
NANCY M. WALLACE
FL Bar No. 65897
AKERMAN SENTERFITT
106 E. College Ave. 12th FL
Tallahassee, FL 32301
Ph: 850-224-9634
Fax: 805-222-0103
katerhine.giddings@akerman.com
nancy.wallace@akerman.com

BRUCE S. ROGOW
FL Bar No. 067999
TARA A. CAMPION
FL Bar No. 90944
BRUCE S. ROGOW, P.A.,
500 E Broward Blvd. Ste. 1930
Ft. Lauderdale, FL 33394
Ph: 954-767-8909
Fax: 954-764-1530
brogow@rogowlaw.com
tcampion@rogowlaw.com

WILLIAM P. HELLER
FL Bar No. 987263
AKERMAN SENTERFITT
350 E. Las Olas Blvd.
Ft. Lauderdale, FL 33301
Ph: 954-463-2700
Fax: 954-463-2224
william.heller@akerman.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed via e-file@flcourts.org, with the original and seven copies mailed to the Clerk, Florida Supreme Court, and copies furnished to counsel listed below, by U.S. Mail this 24th day of January, 2012.

ENRIQUE NIEVES, III
ICE LEGAL, P.A.
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Ph: 561-729-0530
Fax: 866-507-9888
enrique@icelegal.com

CRAIG LYND
CURTIS WILSON
ROBERT HORST
KAUFMAN, ENGLETT,
AND LYND, PLLC
111 N. Magnolia Ave.
Suite 1600
Orlando, FL 32801
Ph: 407-513-1900
Fax: 407-591-3731

KENNETH B. BELL
CLARK, PARTINGTON,
HART, et al
P.O. Box 13010(32591-3010)
125 West Romana St., Ste. 800
Pensacola, FL 32502
Ph: 850-434-9200
Fax: 850-432-7390

By: */s/Bruce S. Rogow*
Bruce S. Rogow

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Fla. R. App. P., and is prepared in Times New Roman 14 point Font.

By: */s/ Bruce S. Rogow*
Bruce S. Rogow

APPENDIX

A *Pino v. The Bank of New York Mellon*, 57 So. 3d 950 (Fla. 4th DCA 2011)

B Defendant, Roman Pino's Rule 1.540(b) Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court